STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 16, 2008
v	No. 276243 Kent Circuit Court
BRANDON JOSEPH HILASKI, Defendant-Appellant.	LC No. 05-003837-FH

Before: Whitbeck, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and maintaining a drug house, MCL 333.7405(1)(d). Because defendant has not: established plain error regarding issuance of the search warrant; shown that the evidence was insufficient to support his convictions; shown that he was denied a fair trial due to prosecutorial misconduct; or shown that the trial court erred when it gave the jury a brief statement regarding search warrants, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the evidence should have been suppressed because the affidavit in support of the search warrant was insufficient to establish probable cause. Defendant did not preserve this issue by raising it below. *People v Bauder*, 269 Mich App 174, 177; 712 NW2d 506 (2005). Therefore, he must establish a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Issuance of a search warrant must be based on probable cause. MCL 780.651(1). "Probable cause to issue a search warrant exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *People v Kazmierczak*, 461 Mich 411, 418; 605 NW2d 667 (2000). "A magistrate can consider only the information in the affidavit made before him in determining whether probable cause exists to issue a search warrant." *People v Sundling*, 153 Mich App 277, 285-286; 395 NW2d 308 (1986). The search warrant and underlying affidavit are to be read in a commonsense and realistic manner. *People v Russo*, 439 Mich 584, 603-604; 487 NW2d 698 (1992). The affidavit may be based on information supplied to the affiant by another person. If the other person is not named, the affidavit must contain affirmative allegations from which the magistrate may

conclude that the person spoke with personal knowledge of the information provided and that the person is credible or his information is reliable. MCL 780.653(b).

When reviewing a magistrate's conclusion that probable cause to search existed, this Court does not review the matter de novo or apply an abuse of discretion standard. *Russo, supra* at 603. Paying deference to the magistrate's determination that probable cause did exist, this Court considers only whether the actual facts and circumstances presented to the magistrate would permit a reasonably cautious person to conclude that there was a substantial basis for the finding of probable cause. *People v Sloan*, 450 Mich 160, 168-169; 538 NW2d 380 (1995), overruled in part on other grounds by *People v Hawkins*, 468 Mich 488, 491, 502, 511; 668 NW2d 602 (2003), and by *People v Wager*, 460 Mich 118, 123-124; 594 NW2d 487 (1999).

The affidavit established that the informant spoke with personal knowledge. He or she had been inside defendant's house and had accurately identified defendant by name and general characteristics. Information that the informant had seen marijuana offered for sale within the house within the last 36 hours was sufficient to create probable cause to believe that contraband would be found there. Although the affidavit did not state how the informant knew that the substance was marijuana, the magistrate could reasonably infer that the informant could identify the substance as marijuana from the information that he or she was familiar with marijuana and had assisted the police in other narcotics investigations. Assuming without deciding that the affidavit was deficient with respect to the informant's credibility or reliability, the absence of such information in violation of the statute does not mandate suppression. *Hawkins, supra* at 510-511. Therefore, defendant has not established a plain error affecting his substantial rights.

Defendant next argues that the evidence was insufficient to support his convictions. In reviewing the sufficiency of the evidence in a criminal case, this Court must review the record de novo and, viewing both direct and circumstantial evidence in a light most favorable to the prosecution, determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). It is for the trier of fact to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence are to be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

"Possession is a term that 'signifies dominion or right of control over the drug with knowledge of its presence and character.'" *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000), quoting *People v Maliskey*, 77 Mich App 444, 453; 258 NW2d 512 (1977). The defendant need not own or have actual physical possession of the substance to be found guilty of possession; constructive possession is sufficient. *People v Wolfe*, 440 Mich 508, 519-520; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the controlled substance." *People v Meshell*, 265 Mich App 616, 622; 696 NW2d 754 (2005), Possession may be proved by circumstantial evidence and any reasonable inferences drawn therefrom. *Nunez, supra*.

Although the living room and the garage where marijuana was found were shared spaces and another person shared defendant's home, an officer testified that defendant admitted that the marijuana in the living room belonged to him and smaller amounts of marijuana were located in a couch with defendant's money and in defendant's car. While defendant denied the admission, "[w]itness credibility and the weight accorded to evidence is a question for the jury, and any conflict in the evidence must be resolved in the prosecution's favor." *People v McGhee*, 268 Mich App 600, 624; 709 NW2d 595 (2005). Therefore, the evidence was sufficient to prove that defendant possessed the marijuana.

It is unlawful to "knowingly keep or maintain" a dwelling "that is used for keeping or selling controlled substances . . . ." MCL 333.7405(1)(d). "[A] person may be deemed to keep and maintain a drug house if that person has the ability to exercise control or management over the house." *People v Bartlett*, 231 Mich App 139, 152; 585 NW2d 341 (1998). "The phrase 'keep or maintain' implies usage with some degree of continuity that can be deduced by actual observation of repeated acts or circumstantial evidence, such as perhaps a secret compartment or the like, that conduces to the same conclusion." *People v Thompson*, 477 Mich 146, 155; 730 NW2d 708 (2007).

Defendant lived at the house in question and admitted that the marijuana found in the living room belonged to him. In addition to the large amount of marijuana, the police found packaging material, scales, and large sums of cash, which was circumstantial evidence that the marijuana was intended for delivery. *Wolfe, supra* at 524; *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). Although the police did not witness any drug sales, an officer testified that defendant admitted he had regularly sold drugs from the house to five people a week. Further, although defendant denied currently selling drugs, the circumstantial evidence, including the large amounts of marijuana, packaging material, scales, large sums of cash, and bags containing small amounts of marijuana, permitted an inference that sales were on-going. Therefore, the evidence was sufficient to prove that defendant maintained a drug house.

Defendant also argues that he was denied a fair trial because of the prosecutor's misconduct in eliciting prejudicial testimony and making an improper closing argument. Defendant did not object to the challenged testimony on the same ground asserted on appeal and did not object to the prosecutor's argument. Therefore, the issue is not preserved and our review is limited to plain error affecting the outcome of the trial. *Bauder, supra* at 177-178; *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004); *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). The reviewing court must examine the prosecutor's remarks in context on a case-by-case basis. *Id.* at 272-273. The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The prosecutor's remarks are not to be taken out of context; rather, his closing argument should be considered in its entirety and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Hedelsky*, 162 Mich App 382, 386; 412 NW2d 746 (1987); *People v Jansson*, 116 Mich App 674, 693; 323 NW2d 508 (1982).

Officer Ken Howland testified about the general procedure for obtaining a search warrant. He further testified to the use of informants and how he tests their credibility and reliability by having them perform at least three controlled buys. Although it is improper for the prosecutor to ask a witness to comment on the credibility of another witness because credibility is a determination for the trier of fact, *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985), such testimony plainly did not bolster the informant's credibility because the informant did not testify against defendant, thus distinguishing this case from *United States v Martinez*, 253 F3d 251, 253-254 (CA 6, 2001). In any event, defendant was not charged with a criminal offense on the basis of any drugs the informant saw in his house. Rather, the informant's observation simply provided a basis for the issuance of a search warrant; it was the drugs and other evidence found by the police when they executed the warrant that gave rise to the charges against defendant. Therefore, even if there had been some improper vouching for or bolstering of the informant's credibility, the error could not have prejudiced defendant.

Defendant next argues that the prosecutor engaged in misconduct by denigrating defense counsel with his references to a "smokescreen" designed to "mislead." The prosecutor exceeded the bounds of proper argument because he expressly indicated that defense counsel was trying to mislead the jury. *People v Light*, 480 Mich 1198; 748 NW2d 518 (2008); *People v Unger*, 278 Mich App 210, 238; 749 NW2d 272 (2008). However, the error does not require reversal because the comments were made in response to defense counsel's argument, defendant failed to object and request a curative instruction, any prejudicial effect could have been cured by an appropriate instruction, and the trial court instructed the jury that the attorneys' arguments were not evidence. *Unger, supra*; *Rodriguez, supra* at 31-32.

Defendant next argues that the trial court erred when it gave the jury a brief statement regarding search warrants. Again, defendant failed to object below and, therefore, we review this unpreserved issue for plain error affecting the outcome of the trial. *Carines, supra* at 763-764. Defendant specifically asserts that to the extent the trial court instructed the jury that "the legal probable cause requirements had been met, and that a judge approved the search in this case," it improperly bolstered the prosecutor's case because it suggested that "there was probable cause that [defendant] possessed controlled substances." Whenever a court imparts information to the jury indicating that the defendant is guilty of the crime charged, it commits error. *People v Hudson*, 123 Mich App 624, 625; 333 NW2d 12 (1982). That did not happen here. Because the jury was about to hear testimony from Howland about how a search warrant is procured, the court informed the jury what a search warrant is (a document allowing entry into a house to search for particular items), that someone other than the trial judge decides whether to issue the warrant, and that the propriety of that judge's decision was not an issue for the jury to consider. Defendant has not shown a plain error.

Affirmed.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio